



February 2, 1730.

INFORMATION

F O R

Mackenzie
HUGH Lord Fraser of Lovat,

A G A I N S T

Captain Simon Fraser of Beaufort.



SIMON FRASER of Beaufort has brought a Process of Declarator, in the Court of Session, against Hugh Lord Fraser of Lovat, under the Name and Designation of Hugh Mackenzie, Son of Alexander Mackenzie of Fraserdale; wherein he insists to have it found and declared by the Lords, "That the said Hugh, as Heir general and of Line to the Lords of Lovat, has no Right to assume and use the Title, Designation and Dignity of Lord Fraser of Lovat; and that he the Pursuer as Heir-

A

male

" male of this Family, has the only Right to the said Title
 " and Dignity, with all the Privileges and Pre-eminentces
 " which are consequent upon the same."

Tho' the Baronage of *Lovat* be amongst the most ancient Dignities in the Peerage of *Scotland*, yet so it has happened, that the Titles, as well as the Estate, have always descended to, and have been possessed by the *general Heirs at Law*; who happening to be Males, there was no Place for the Question, How this Title and Dignity was descendable? whether to the *Heir general at Law* in the direct Line, or to the *collateral Heir-male*? till the Year 1697, in which *Hugh Lord Fraser* of *Lovat* died, having Issue, four Daughters: And although this Pursuer had at that Time the same Pretensions he has now, yet he moved in no Claim of this Kind; and when called upon, in a proper Process, to dispute his Title to this Dignity, he waved appearing, so as Decree of the Lords, in the Year 1703, past against him; and ever after he quietly allowed the Lady, eldest Daughter of the said *Hugh*, as *Heir at Law*, to possess and enjoy the Honours of the Family, under the Title of *Æmilia Lady Fraser of Lovat*, till of late, that the Heir of this noble Family being unhappily brought under great Straits and Distresses through the Means of this Pursuer, he has laid hold of this as the most favourable Opportunity, to move in a Claim, which for so long Time he either had no Thoughts of, or had deserted and given up.

But whatever the Defender's Circumstances are, the Law is ever the same; and if he is at a Loss in one respect, he comforts himself with the Advantage he has in another, That at no Time could the Question have been moved when the Law was under the Direction of Judges more learned, impartial and discerning.

The Family of the *Frasers*, as far back as we have Records and History to be relied upon, have been reckoned amongst the most considerable and powerful in the Kingdom; and for this

this very Reason, there can be no doubt but they were of the *Magnates & proceres regni*: But as there is no fix'd Period when the Title and Designation of *Lord* was first used in *Scotland*, and that after this Appellation had been introduced, we see that in the Reign of *James I. of Scotland*, the *Lords* of Parliament were sometimes designed *LORDS*, and about the same time designed by their Name and Surname, and Title of their Estates, without the Distinction of *Lord*, of which there are a great many Instances (a); so it appears from an Indenture betwixt *William of Fenton* Lord of that Ilk, and *Hucheon Fresal* Lord of the *Lovat*, as early as the Year 1416, in the Beginning of *James I.*'s Reign, the Parties contracting are designed, *Two noble Lords*, and the Lord *Fenton*, in contemplation of the Marriage with *Janet* his Sister, makes over to the Lord *Lovat* and the said *Janet* in conjunct Fee, and to the Heirs of the Marriage, several Lands; for the which Causes the Lord *Lovat* on his part obliged himself to give to the said *Janet*, in Name of Dowry, L. 20 yearly out of his Lordship of *Golsford*.

By another Indenture, betwixt *Thomas Dunbar* Earl of *Murray* and the Lord *Lovat*, he is designed, *An Nobleman Hucheon Fresal Lord of the Lovat*; and thereby he obliges himself, “ That his Son and Heir should marry a Daughter

“ ter

(a) Vide Decree of Parliament, March 17, 1429, lib. 3. No. 18. of the Records, which Decree is in favours of *Margaret Craigie*, touching the Lands of *Leuchald*: And in the Preamble, as the Use was at that time, the Names of the Prelates, Earls, and Lords of Parliament present, are set down; among the Lords Barons, besides the High Constable and Marischal, are, *Domini de Abercorn, de Dalkeith, de Erskine, de Lochaw, de Gordon, de Dirleton, de Somerville, de Maxwell, de Montgomery*; yet anno 1439, the Lord *Dalkeith*, in a Charter from the King, is designed *Jacobus Douglas Dominus de Dalkeith*; and the Lord *Lochaw*, in his charter of Foundation of the Collegiate church of *Kilmannan*, anno 1442, designs himself, *Duncanus Cambell de Lochaw miles*. The Lord *Montgomery*, in a commission he gets to be governour of *Kintyre* and *Knapdale*, anno 1430, is only designed *Alexander Montgomery of Ardrossen*. The Lord *Somerville*, in a Charter mortifying some Lands for pious uses, anno 1434, designs himself, *Thoma, Somerville Dominus de Carnwyth*; and the Lord *Maxwell*, who is a Witness to it, is only stiled, *Herbertus Maxwell Dominus de Carlaverock*. And in the Records of Parliament, anno 1434, the Lord *Dirleton* is only stiled, *Walterus Haliburton de Dirleton*.

March 3. 1416.

August 9, 1422.

“ ter of the Earl’s; and this Heir, the Son of the said Lord
 “ of the *Lovat*, failzieand, (as God forbid he do, bot that
 “ he haif an Douchter-heir or Douchters-heirs, the said Lord
 “ of the *Lovat* [says the Indenture] is oblyst, and be thir
 “ Letters oblysis himself, as of befoir, to gif that Douchter-
 “ heir or his Douchters-heirs, to the said Lord the Earl’s Son
 “ or Sons, to be gotyn betwixt hym and his spousit Wife,
 “ and the Heirs Male or Female, Sons or Douchters of the
 “ said Lord of the *Lovat*, failzieand; the said Lord of the
 “ *Lovat* is oblyst, and be thir Letters oblyses him, That his
 “ Heirs, whatsoever they be, shall hald and fulfill this Tre-
 “ ty.” In contemplation whereof, the Earl granted to the
 Lord *Lovat* and his Heirs, the Barony of *Abertarf*, &c.

The same *Hugh* Lord *Fraser* of *Lovat* was one of the Hostages for the Ransoin of King *James I.* and in the record

^{1424.} *Rymer’s Fœdera,* he is designed, *Hugo Dominus de Lovat*: And after the Tom. 10. p. 333. King’s Return, it appears, from two Charters granted in favours of the same *Hugh*, proceeding upon his own Resignation, the one of the Lands of *Golsford*, *Borland*, *De monte*

^{† Sept. 14. anno viridi,} and others [‡], the other of the Lands and Barony of ^{25 Ja. I.} *Kinnel*, that these Baronies and Estate were settled as the Lib. iii. No. 29. & 72. of the Records. other Estates in the two Indentures above mentioned, upon the said *Hugh*, and his Heirs and Successors whatsoever.

This *Hugh* was succeeded by another *Hugh* Lord *Fraser* of *Lovat*, who appears to have been noble, and of great Power and Consideration in the Country: For by an Indenture betwixt him and the Burrough of *Nairn*, the said Burrough became obliged to an honourable Lord, *Hugh* Lord *Fraser* of the *Lovat*, his Heirs and Successors, *in leil and true Man- rent and Service*, &c. and the said *Hugh* Lord *Fraser* of *Lovat* binds and obliges him his Heirs and Successors, “That he shall be to them a *good Lord*, Maintainer, Protector and Defender in all their right wife Causes, Quarrels and Actions.” This Indenture bears Date the 3d of March 1472. Thomas Lord *Fraser* of *Lovat* succeeded; and by a Precept

of Sasine from King James IV. * he was infest, as nearest and lawful Heir to his Father, in the Castle and Lands of *Lovat*, Third Part of the Baronies of *Ard* and *Abertarf*, *Glenelg*, and a great many other Lands †. And several other Charters of Lands purchased by him in his Father's Life, and before the Date of this Precept of Sasine, as well as those he purchased after, such as, the Barony of *Kinell* †, which had recognosced, the Lands of *Dalcross* and *Kirkton*, the Lands of *Moyis*, *Ardrannoch*, *Ingliston*, *Balcarranach*, *Kilbirnie*, Castle of *Beaufort*, are all taken to the said *Thomas Lord Fraser of Lovat* and his *Heirs*, simply, or (as in most of the Charters *) to him, his *Heirs and Affignies whatsoever*.

The Pursuer has admitted, that this *Thomas Lord Fraser of Lovat* was noble, and a Lord of Parliament, tho' notwithstanding the Evidences already brought, he seems to doubt if his Predecessors were so; and yet by his Son's Retour †, he is only designed, *Thomas Fraser Dominus de Lovat, pater Hughonis Fraser, latoris presentium*: And *Hugh* his Son has no other Designation all along in the Retour, but *Hugo Fraser lator presentium*; yet he likewise is admitted to be noble, and a Lord of Parliament; and by the Retour he is served as nearest and lawful Heir to his Father, in all the Lands and Baronies above mentioned, holding of the Crown; and as such, he is infest, and the publick Instrument of Sasine * lies in Proces. He likewise got several new Charters †, as well from the Crown as from Subject Superiors, particularly one from King James V. of the Barony of *Kinnell*; and this Charter, as well as the others, is taken to him and his *Heirs whatsoever*, and are to be seen in the Records †, as referred to or produced in Proces.

It is true the same *Hugh Lord Fraser of Lovat* sometime thereafter resigns some of his Lands, and thereupon had a Charter from the Crown in favours of himself and the Heirs-male of his Body; whom failing, to his nearest and lawfull Heirs-male whatsoever: Yet a great Part of his Lands still

* April ult. 1501.

† Oct. 21, 1498,

& 1499.

† Oct. 14, 1501.

Nov. 17, 1501.

May 6, 1509.

Jan. 12, 1510.

June 14, 1511.

June 1, 1514.

* Lib. 13. N^o. 431.Lib. 14. N^o. 71.Lib. 15. N^o. 119.Lib. 16. N^o. 23.Lib. 16. N^o. 35.Lib. 17. N^o. 23.Lib. 19. N^o. 42.

+ Jan. 10, 1524-5.

* March 15, 1524.

† Lib. 24. N^o. 74.Lib. 24. N^o. 272.Lib. 27. N^o. 5 & 312.Lib. 28. N^o. 79.

+ Sept. 14, 1537.

remained under the antient and uniform Destination, to Heirs simply, or to Heirs and Assignies whatsoever, which are one and the same Thing. And upon the first Prospect that the Heir-male in a direct Line was like to fail, that is about the Year 1665, *Hugh Lord Fraser of Lovat* for the Time, made a Bond of Entail for resigning the Lands and Barony of *Lovat*, for new Infestment to himself in Liferent, and to Mris. *Anna Fraser* his eldest lawful Daughter, procreate betwixt him and Dame *Anna Mackenzie* his Spouse; which failing, to any other Heirs-male to be procreate by him and any other his lawful Spouse; which failing, to the said *Anna Fraser*, and the Heirs-male of her Body; which failing, to her eldest Daughter, or Heirs-female, without Division; which failing, to his other Daughters successive, according to their Births, and the Heirs-male of their Bodies; and failing of such Heir-male, to the eldest Heir-female without division; with this Provision, That his said eldest Daughter, and the remanent Heirs-female succeeding to him by the aforesaid Tailzie, shall marry a Gentleman of Quality, who and their Heirs succeeding in the Right of the saids Lands, by Virtue of the Provision aforesaid, shall assume and take the Name of *FRASER*, and bear and carry the arms of the House of *Fraser of Lovat* in all Time coming; and with this further Provision, That the Lands should be redeemable from the said Mris. *Anna Fraser* by the Heirs male of the said *Hugh Lord Fraser's* Body only.

Upon this Tailzie Mris. *Anna Fraser*, the Heir-female, was infest; but the Deviser having soon afterwards had a Son, *Hugh Lord Fraser of Lovat*, the Estate was redeemed. And he in his Contract of Marriage with Lady *Æmilia Murray*, Daughter of the Marquis of *Athole*, did in like Manner tailzie his Estate, Land and Baronies, to the Heirs-male of the Marriage; which failing, to his Heirs-male by any other Marriage; which failing, to his eldest Heir-female without division: And he dying in the Year 1697, as is before observed,

ved, without Heirs-male of his Body, the Estate, Honour and Dignity descended to his eldest Daughter *Æmilia Lady Fraser of Lovat*, and was confirm'd to her by Decreet of Session ; and by her Death, to *Hugh Lord Fraser of Lovat*, Defender in this Process.

From the Writs and Evidents above recited, these Things appear obvious, *First*, That in the Year 1416 the Family of *Lovat* was Noble, and that from thence to the Year 1539, during the Course of 123 Years, the whole Estate, and every the least Parcel of it, was settled in Fee simple to the *Heirs general at Law*. *2dly*, That from the Year 1539, in which the Destination of the Estate was altered from the *Heir-general* to the *Heir-male*, there is no place for any Dispute, either about the Honours or Estate ; the Character of *Heir-general* and *Heir-male* concurring down to the Year 1665. And *3dly*, That so soon as there was any Prospect of a Failure of a male Heir in the direct Line, the Rights of the Estate were devised to the *Heir-general, tho' Female*, in Exclusion of a collateral *Heir-male*, by Reason the Honours behoved to go in that Descent ; and according to that Destination, the Titles of the Estate remain to this Day.

This being the State of the Rights of the Family of *Lovat*, the Question arising from the Conclusion of the Process brought by the Pursuer is, Whether the Title and Dignity of *Lord Fraser of Lovat* is descendable to the *Heir-general at Law* in the right Line, or to the remote collateral *Heir-male* ?

That the Title and Dignity of a *Lord Baron*, as well as the other higher Degrees of Honour ; such as *Viscounts, Earls, Marquisses, Dukes*, is a Right of Inheritance and descendable, will on all hands be admitted ; and where there is no particular Limitation of the Descent to any certain Line of Heirs, what other Rule can be brought for judging of the Descent of this Right of Inheritance, than the common Law of the Land, by which all Inheritances of whatever Kind are to be governed ? If therefore it shall appear, that by the Law

of *Scotland* all Rights of Inheritance are descendable to the Heirs-general at Law, Titles of Honour and Dignities must descend in the same Manner ; and it will ly upon the Pursuer either to show, that the Title and Dignity of *Lovat* was by some special Deed limited to Heirs-male, or to bring some other Law or Rule whereby Dignities of this Kind are excepted and forepriz'd out of the common Law of Descent, which regulates all other Inheritances within *Scotland*. But this he has never been able to do : A faint Attempt was indeed made in the Pleading, to have the antient Feudal Law established as the only Rule of deciding in this Case ; and something was likewise urged from the Nature and End of such Dignities ; all which shall be taken notice of in its due Place : But in the mean Time the Defender shall proceed to clear these Points, upon which, as he conceives, the Decision of the Question does chiefly depend.

And *First*, That by the Common Law of *Scotlond*, the Right of Inheritance in general is descendable to the Heirs at Law in the direct Line, where such Heir is Female, to the Exclusion of a remoter collateral Heir-male. *2dly*, That neither our Law, nor the Lawyers who have wrote upon our Law, have made any Distinction betwixt Titles of Honour and any other Inheritance ; nor does our History afford any Instances of such a Distinction from the most early Times down to this Day. *3dly*, That there are many Instances both in our History and Records, which support the general Ground of Law, and destroy the Distinction endeavoured to be established. *4thly*, That the Decisions of the Court of Session, so often as the Case has been disputed, have neglected this Distinction betwixt the Descent of Honours and other Inheritances, and established the Common Law to be the Rule in both, where no Limitations to Heirs-male has appeared. And *lastly*, the Law and Practice of *England*, and other Nations shall likewise be considered, with respect to such Dignities and Honours ; from whence it will appear that there is

no Distinction betwixt *these* and other Inheritances, but that the Law of the Land with respect to *Succession*, is the Rule in both.

As by the Divine Law the Succession of Females was established, the Law of the *Scots* (from whatever Nation these had their Origin) in this Point appears to have been the same; and tho' the most ancient of these are not now extant, yet our Historians, particularly *Lesly* and *Chalmers of Ormond*, tell us, *It was an Article in the League betwixt the Scots and Piets, that Women should succeed.* So says a later Author *Mr. Innes*, in his *Critical Essay on the ancient Inhabitants of Scotland*, who if he does not in every Thing agree with our other Antiquaries as to our first forty Kings, pretends to make his Countrymen Amends, by giving them many more of the *Pictish* Race, by a Marriage of the King of *Scots* with the only Daughter and Heir of the *Pictish* Crown: And as far back as the Time of *Mackbeath*, who preceeded *Malcolm Canmore*, our Authors, as well Historians as Lawyers, take Notice, that the Succession of Females was by Law established. The learned *Craig*, lib. 1. dieg. 8. says, *Et in Mackbetho quædam de successione fæminarum carentur, & ne fæmina heres feudi domino suo invito nubat.* And in the Time of *Malcolm Canmore* his Successor, there can be no doubt that the Female Succession obtained in *Scotland*; for in the *Division*, or the giving out of his Lands to his *Barons* or *Freemen*, he took Care to reserve the Ward Relief and Marriage of the Heirs of his Vassals, whether these were Male or Female. And in the Reign of *David I.* in whose Time most of our Authors agree the Books commonly called *Regiam Majestatem* were writ, the same Rule of Succession was continued without any Distinction whatever, lib. 2. cap. 25. *Hæredum alii proximi, alii remotiores sunt: proximi hæredes alicujus sunt, quos ex suo corpore aliquis procreavit, ut filius & filia.* And cap. 27. having treated, *de successione filiorum ad patrem;* the

next Chapter, *de successione filiarum ad patrem*, says, *Idem descendum de filia una relitta, ut de uno filio; si autem quis plures habuerit filias, inter eas dividetur hereditas, sive fuit miles, sive soccomannus, burgensis, sive alias liber homo pater earum.* And then in the next Chapter follows, *Qualiter maritus primogenitæ filiæ facit homagium pro se & sororibus uxoris suæ.* In Chapter 41 and 42 is treated, *de ætate legitima heredis militum, & de potestate dominorum in heredes suorum hominum.* And in both these Chapters the Succession of Female-heirs is taken as undoubted, and how the Fee returns to the Superior during their Ward, till their lawfull Age, and what Power the Superior has over the Persons and Estates of the Vassal during that Time, is defined, of which more in Chapters 48 and 57. *in fin.* And Chapters 58, 59, and 70. treats, how Homage is done to the Superior by the Husband of Female-heirs: So that from these Chapters, with Skeen's Observations upon them, it is very plain, that Women did not only succeed in military Fees, which all the World allows were Fees with Jurisdiction and Dignity; but also, that the Female-heir *prestebat fidelitatem*, and her Husband, *ratione curialitatis*, did Homage. Our later Authors are so full to the same Purpose, and the Course of our Practice down to this Day so uniform, that it would be in vain to insist further upon it, in a Court where these Points are so well known.

It will be more proper here to remove an Objection,
 " That tho' the general Course of our Law is such,
 " where Rights appear to be limited *heredibus quibus-*
 " *cunque*, to Heirs whatsoever; yet it is not so, where
 " no mention at all of *Heirs* is made, or where the Right
 " is devised simply *heredibus*; as in the present Case,
 " where the Dignity is neither territorial, descendable with
 " an Earldom or Lordship, and where no Patent ap-
 " pears."

Here again is another Distinction, without any Authority from the Law ; for, so far as the Defender knows, it is no where said, either in our Law, or Law Books, that where *Heirs* are not named in any Right, or where *Heirs* simply are named, the *Heir-male* is to be understood ; and where our Law has introduced no Exception, the general Disposition of the Law ought to obtain : Which (where there is no express Limitation to *Heirs-male*) carries the Inheritance to the *Heir General at Law*. But this is further confirmed by the Opinion of our Lawyers, *Stair lib. 3d. tit. 5. num. 5th*, where he says, *That tho' there be no mention of Heirs in the Deed, yet the Heir has Right to it* ; which he confirms by several Decisions, not only in personal, but in real Rights, such as Reversions and Substitutions : And the Instances he brings, when the Practicques are look'd into, do shew, that the *Heirs-general*, and not the *Heir-male*, were found to have the Right in the same Manner as if *Heirs* had been express; which further clears that, if *Heirs* simply had been express, there would have been no Doubt the Right would have descended to the *Heir at Law*, tho' the Word *whatsoever* had not been added.

And so indeed *Balfour*, an ancient Author of our Law, understands it, *Title of Heirs and Successors*, where he fully treats of the Female Succession. *Craig* likewise, who seems abundantly favourable to the Prerogative of the Male Line, and is the first of our Lawyers who has laid any Stress upon the Particle *quibuscunque* adjected to *Heirs*, yet still admits, that whatever the Presumption of the old *Feudal Law* might have been, Page 59, *usus tamen noster longe dissentit*; *præsumit enim feudum ad fœminas æque ac mares descendere, nisi bæredibus masculis fuerit provisum*: And Page 237, *at nostri mores, per generalem bæredum mentionem, etiam fœminas ad successionem, non extantibus maribus, admitti putant*; *boc eo evenit, ex adjectione vocis (quibuscunque) quæ determinatio, etiam sine dubio fœminas comprehendit*; *itaque est pronomen quod differentiam inducit*; and then he adds, *quod in omnibus investituris adeo frequens est, ut etiam cum omis-*

omissum est, pro expresso habetur: By which last Words he plainly declares his Opinion, that tho' *quibuscunque* is not added to the Termination of Heirs, the *Heir of Line* is understood.

A great many Instances may be brought from Records and Charters, in Support of the Opinion of these our Lawyers, which at the same Time likeways exclude the Distinction the Pursuer would introduce, betwixt the *Inheritance in Honours*, and the *Inheritance* in any other Right, and confirm that the Rule in both is the same. In the Grant of the Constabulary by King *Robert the Bruce*, to *Gilbertus de Haya*, it is to him and *hæredibus*; and yet that high Dignity, as it had been possest by Females before, and by their Husbands in their Right, so it was descendible to *Heirs-female*, and is at this Day possest by a noble Lady the Countess of *Errol*, whose Right was sustained and affirmed by the Court of Claims at last Coronation, at which my Lady's Deputy had his due Place assigned him, as Deputy of the high Constable of *Scotland*. And by the Charter from King *Robert*, of the Earldom of *Strathern*, in favours of his Son *David*, the Earldom of *Strathern* is granted to *David filio nostro & hæredibus suis*, without any Mention of *quibuscunque*, and yet *Eupham*, *David*'s Daughter, did succeed to her Father in that Earldom, and carried it alongst with her to *Patrick Graham* her Husband, who (and his Son by her) enjoyed the Title of *Earl of Strathern*, and in all Probability, their Successors would have done so to our Days, had the History of *Robert II*'s Marriages, and the Descent from him been so well understood as it is of late, by the Learning and Industry of the Historians and Antiquaries, whose Writings are in every Body's Hands: However this is still to be observed, that notwithstanding of the great Anxiety to set aside the Title of the *Earl of Monteith*, as *Earl of Strathern*, because, as was alledged, he did not clearly connect his Titles with *Eupham Countess of Strathern*, yet still there was no Objection made by the King's Lawyers, that the Grant to *David* was only *sibi & hæredibus*, whereby the Countess could not succeed; neither was it alledged that

that such Dignities were not descendible to Females, tho' these Circumstances in the Case were too obvious to have been neglected by the King's Lawyers, who had the Opportunity of the Records, and the Earls Writs and Evidents in their Hands: But tho' either of these Allegations would have at once terminate the Process, which otherwise did not want its Difficulties, the Lawyers of these Days knew our Law too well, to insist upon such Arguments and imaginary Distinctions.

This naturally leads to the second thing which was proposed, *The Opinion of our Lawyers upon this Question*: *Balfour* and *Craig* have already been referred to upon the general Disposition of our Law, touching the Succession of Females; and altho' they do not expressly mention, that the *Heir-female* succeeds in Dignities, by Reason that it is supposed, no Ground for the Distinction betwixt these and other Subjects did occur to them; yet still they are treating of *Feus*, many of which had Dignities annexed: And therefore if there had really been any Distinction in Law, it could not well have escaped them. But my *Lord Stair* is express upon the very Question in Debate, *Lib. 3, tit. 5th, Num. 11th*, *Heirs Portioners are amongst Heirs of Line*; for when more Women or their Issue succeed, failzieing Males of that Degree, it is by the Course of Law that they succeed; and tho' they succeed equally, yet Rights indivisible fall to the eldest alone, without any thing in lieu thereof to the rest, as first the Dignity of *Lord, Earl, &c.* And num. 12, this Author says, *Heirs-male and of Tailzie and Provision succeed not by Law, but by the Tenor of the Infestment or Provision*; and therefore have no more Benefit than what the Tenor of the Provision carries them to: So likewise Sir George Mackenzie, *Lib. 3, tit. 8*, of his Institutions, says, *The eldest Heir-female succeeds in Titles and other indivisible Rights*. And indeed the lineal Succession, including Heirs-female, was so much considered to be the Right and Law of this Kingdom, that in the *Revocations of our Princes*, their admitting of Resignations of Tailzie, changing the Succession from Heirs to Heirs-male, is revoked as against Ju-

stice and good Conscience, disinheriting of righteous Heirs; and therefore such Alterations are declared to be of no Avail, Force nor Effect: The Words of James IV.'s Revocation are likewise, *We revoke and casses all Tailzies made frae the Heirs-general to the Heirs-male, of any Lands in our Realm;* which is *verbatim* used in other succeeding Revocations. And James V. adds the Words, *as against Law and good Conscience.*

From these Authorities, two Things are obvious; *first*, That there is no Distinction in our Law betwixt Descent of Dignities, and any other Right of Inheritance, but that both equally descend to the *Heir-general* at Law. *2dly*, That the *Heir-male* is in the same Case with Heirs of Tailzie and Provision; that is, they can take nothing but in virtue of the Limitation or Provision in favours of such Heirs; and consequently where no such Limitation or Provision appears in favours of Heirs-male, (which is the Case the Pursuer himself here supposes) the Descent must go according to the general Provision of Law, that is, *to the Heir of Line.*

Our Historians and Records confirm the Opinion of our Lawyers, not in Point of Authority, for that we own is none of the Business of a Historian, but by affording so many Examples and Instances of Descent of the highest Dignities upon the *Heirs-female*; that it must amount to a Demonstration, the Distinction now endeavoured to be introduced, was never heard or thought of in remoter Times.

We have already observed from *Lesly* and *Chalmers*, our Historians, that as far back as the ancient League betwixt the *Scots* and *Picts*, the Succession of Females was established, seeing this was one of the Articles, *that Women should succeed*; since which Time, we are so far from having any Statute, Law Book or Historian, from whence an Alteration in our Law, in so material a Point, can be observed, that all of them, as has been before noticed, concur to make out the Continuance of this Rule of Succession: *Macbeath*, *Malcom II.* and *Malcom Canmore's* Laws, and the *Regiam Majestatem*, are all to the same Import. The

Instance likewise of the High Constable of *Scotland*, in the Noble Lady now possessed of it, has been referred to. And Buchanan in his History of the Year 1223, tells us, *Rollandus uxorem duxerat sororem Gulielmi Morvillii, qui comes stabuli in Scotia erat, quo sine liberis defuncto, Rollandus hereditarium cum magistratum accepit*: And Allan having succeeded to *Rolland*, the Constabulary, by a Daughter of his, was vested in *Roger de Quincy Earl of Winchester*, and by a Daughter of this Earl, the same Dignity past to *Cuming Earl of Buchan*; but from him was claimed by Earl *Ferrers*, whose Mother was the eldest Daughter of *Roger*, as observed in the printed Remarks for *Hugh Lord Lovat*, Page 34.

The History of *England* likewise informs us, that the same and like Dignities were descendable to Females; for *Böhun Earl of Hereford* was heritable Constable of *England*, from whose Family it past by a Daughter, to *Stafford Duke of Buckingham*; and altho' it was a Question how this Dignity should be exercised, while in the Person of a Lady, it was never so much as doubted but she had the Right and Title; and upon the Question, it was resolved by all the Judges of *England*, That while the Lady was unmarried, the Office should be exercised by a Deputy, and when married, by her Husband, who fell to do Homage for her in respect of the Dignity. So likewise the Dignity of High Marischal was derived into the Family of *Norfolk* by a Daughter from *Thomas de Brotherton**.

But because the Purfuer, who is ever fond of Distinctions in maintaining a Pretence which has no Manner of Foundation in the beaten Path of our Law, imagines here too that there is a Distinction betwixt Offices and other Noble Dignities; we shall proceed to show that there is no Ground for any such Distinction, after having observed, that here he is as much at a Loss to find out Law or Practice to shew any Difference in the Distinction he would have established, as in these other which have been already refuted.

* Coke Instl. Part 1st. Lib. 3d Cap. 1st
§ 241, verbo de ter-
res & tenements.

Dyer's Reports, p.
285.

Dugdale's Baron-
age of England.

And

And in the *First* Place, It has been agreed upon by all the Historians of the *English* Nation, and of the *Saxons*, from whence the *English* had their Origin, and in whose Time the Dignity of Earls and Barons was introduced, that the *Comites* and *Barones* were mere Officers, first annual, and then during Life. And *lastly*, After the Conquest they became hereditary, and the Honour and Office (which soever the Pursuer is pleased to call it) became descendable in the same way as the *Earldom* or dignified Barony itself, to *Heirs-male*, or of *Entail*, conform to the Provisions and Limitations of the Earldom or Barony held by that kind of Tenure of the Crown ; but where there was no such Limitation or Provision to *Heirs-male* or of *Entail*, But that the Earl or Baron, and his Heirs, were to hold in free Earldom or Barony, the Dignity, with the Barony itself, was descendable to the *Heirs-general coming* (as the Term is) and so it continues to this Day, as shall hereafter more fully appear : But this in the present Argument is sufficient to shew, that the Distinction betwixt the Dignity of *Constable* and *Marischall*, or of an Earl or Baron of the Realm, is without any Foundation.

But what stronger Argument can be brought against this imaginary Distinction betwixt the Dignity of an Officer of the Crown, and that of an Earl or Baron, than that the last were equally descendable to the *Heirs-female* as the first. *Buchanan*, in the Place formerly referred to, proceeds to relate, That *Allan*, Son to *Rolland*, intermarried with the Earl of *Huntington*'s eldest Daughter, and of her had three Daughters ; and that the second Daughter of the said Earl of *Huntington* was married to *Robert Bruce* Lord of *Annandale*, Father of *Robert Bruce* Earl of *Carrick*: and then he recites how this Dignity had passed to the Family of *Bruce* : *Robertus Brusius, qui Carricæ Comes est dictus, hanc ob causam quam dicam ; Martha Carricæ Comitissa, jam nubilis, ac patris qui in bello sacro decesserat unica hæres, cum forte inter venandum conspexisset Robertum Brusium omnium*

omnium æqualium adolescentium longe formosissimum, dum in arcem suam propinquam benigne invitat, renuentem ac prope invitum dicit: ibi cum ætas, forma, genus, mores, facile mutuum amorem conciliaffent, paucis consciis, matrimonio copulantur. And Chalmers of Ormond in his History, Pag. 153. gives the same Account, viz. *Robert Bruce, fil de Robert Bruce Signeur d'Annandale, eut la Comte de Carrick a raison de sa femme Martha fille unique de ce Comte trespassé en la terre sancte.* With this agree the Extracta de Chronicis, Fol. 128. And the Extracts from the Black Book of Paisley, Book 10. Chap. 29. in Bibliotheca Juridica Edinburgensi, and is further confirmed by a Resignation made by Robert Bruce Earl of Carrick, in the Hands of K. John, anno 1292, in favour of Robert his Son, afterwards King of Scotland, of the Earldom of Carrick, which, he says, he held, *Ratione Margaretæ quondam Comitissæ de Carrick sponsæ suæ, matris ejusdem Roberti;* and resigns it in favours of his said Son, *Tanquam virus & legitimus Dominus prædict. Comitatus.* Rymer's Fœdera Angliae, Tom. II. Pag. 613.

Several Instances to the same Purpose are to be seen in Sir James Dalrymple's Collections concerning the Scots History, Pag. 345 & sequent. but the Defender shall only mention a few, referring for the rest to that learned Author, and to the List and Condescendence of the Nobility lying in Process.

Thus in the Family of Mar, *ibid. Pag. 380.* *Agnes Comitissa de Mar,* is mentioned in a Charter in the Lawyer's Library, and the Earl Morgan her Husband, and the Male-line of Gratney Earl of Mar their Successor, failing in Thomas Earl of Mar his Grandchild, who died Issueless in 1379, he was succeeded in his Honours and Estate by Margaret his Sister, who married with James Earl of Douglas, and James Earl of Douglas her Son carried the Title of both Earldoms; but he being killed at the Battle of Otterburn in 1388, and

leaving no Issue, the Dignity went to *Isabel Douglas* his Sister-german, who married with *Alexander Stewart* Son to the Earl of *Buchan*; and that Line again failing, there arose a Question touching the Succession to the Dignity, wherein both Parties founded on their Titles, as descended of Heirs Female; King *James II.* by his Descent from *Robert the Bruce's* first Wife, Daughter of *Gratney Earl of Mar*; and the Earl of *Mar's* Predecessor claimed it as descending of *Helen* another Daughter of the same *Gratney's*; and at last, after a long Interruption, *Erskine Earl of Mar's* Titles was acknowledged, first by *Queen Mary* in the Year 1565, and thereafter in the Parliament 1587.

The Earldom of *Fife*, did also descend to an Heiress, *Isabel Countess of Fife*, who by an Indenture 1371, gives the Earldom to *Robert Stewart* Brother to her Husband *Walter* then deceased, and who is designed *Comes de Fife & Monteith*, until he was created *Duke of Albany*.

The Earldom of *Strathern* was granted by King *David II.* anno 1357, to *Robert Great Steward of Scotland*, and by him to *David* his eldest Son, by a second Wife, who (as has been already observed) was succeeded by *Eupham* his Daughter, and she is designed *Comitissa Palatina de Strathern*; and her Son, in a Charter 1422, *Malisius Greeme potens & magnificus Comes de Strathern*.

There are likewise several Instances in the Family of *Buchan*; for *Stewart* Earl of *Buchan* having married the Countess of *Ross*, in the Chartulary of *Murray* he is designed *Earl of Buchan and Ross*; and in an Indenture betwixt the said Earl and Countess his Lady, anno 1389, she still retains the Title of *Countess of Ross*. And the direct Line of Males in this Family of *Buchan* having failed, *Douglas*, Son to the Laird of *Lochlevin*, married the Heiress, who was succeeded by *Mary Douglas*, Countess of *Buchan*, their Daughter. And a second Son of the Family of *Mar* having married with *Douglas Countess of Buchan*, anno 1615, there is a Contract

tract matrimonial entered into betwixt them, of the Date the 15th June that Year; and by a Charter from King James VI. of Date the 22d of March 1617, proceeding upon the Resignation of the said *Mary Douglas Countess of Buchan*, the Earldom is taken to the said *Mary* and her said Husband in conjunct Fee and Liferent, and to the Heirs-male to be procreate betwixt them; which failing, to the said *James Earl of Buchan*, his Heirs-male and Assignies whatsoever; and contains a Clause, whereby the King grants to the said *James* and his forefaids, the Honours, Dignities, &c. which were enjoyed by the former Earls of *Buchan*; Predecessors of the Countess.

This Instance was excepted to by the Pursuer as good for nothing, by reason of the King's Grant, who being the Fountain of Honour, could limit the Dignity according to his Royal Will. But this is rather avoiding than removing the Force of the Argument, which lies in this, That *Mary the Heir-general at Law of the Family of Buchan*, had the Title and Dignity of *Countess of Buchan* in her, before the Resignation in the Year 1617, for under that very Title and Designation she is called in the Decree of Ranking of the Nobility in *James VI.'s Time, anno 1606*: And in a Reduction of that Decree before the Lords of Session, concluding a Declarator of Precedency, prosecute at the Instance of the said Dame *Mary Douglas Countess of Buchan*, she libels her Title, as immediate Heir by Progress to umquihle *James Earl of Buchan, Lord Auchterhouse*, her fore Grandfather's Grandsire; and the Lords reduced the pretended Decree pronounced by the Commissioners, whereby *Alexander Earl of Eglinton*, and six or seven other Earls there mentioned, were preferred in Dignity to the said Dame *Mary Douglas Countess of Buchan*, and she is thereby declared to have the Precedency of them; which Decree is dated the 25th July 1628, and is ratified in the Parliament 1633, as may be seen

by

by the 35th Article of the unprinted Acts of that Parliament,
and by the Decree itself among the Records.

The Clause therefore in the Charter under the Great Seal above mentioned, giving the ancient Precedency to *James* and his Heirs, as it does not concern the Title and Dignity of the Countess, which was already in her, so it had a valuable Effect as to *James* her Husband; for the Contract of Marriage to which the Charter refers, conveying the Lands to the *Heirs-male* of the Husband, failing Heirs-male of the Marriage, it was very obvious that such extraneous Heir-male was not so much as of Blood to the ancient Earls of *Buchan*; and therefore to convey the *Dignity* to them, in case of Failure of Heirs-male of the Marriage, this extraordinary Clause was necessary; and the Heirs-male of that Marriage having lately failed in *William Earl of Buchan* last of that Line, the noble Lord, who now is honoured with that Dignity, has Right to the Benefit of this Clause.

Neither does it import, That by the Charter proceeding upon this Resignation, the Honours are given to Heirs-male. There is no doubt, when such Honours are resigned to the Crown, the King may give them out under such Limitations as his Majesty shall think proper; and there are many Instances, in which, tho' the Honours have come into a Family by the Heirs-female, yet these have, by new Grants of the Earldom or Lordship to Heirs-male, been limited by the Crown, and so continue limited down to this Day, to the Exclusion of Females: And if the Pursuer could vouch by any Grant, that the Honours of *Lovat* were limited in this Manner, there is no doubt but the Defender behoved to succumb. But this is not the Case: The Question is, How the Descent is by Law to be governed, where no Limitation to Heirs-male does appear, either by Patent, or by Charter of a Lordship or other dignified Barony? And in such Case, the Defender does humbly plead, the known Law of the Land, touching the Descent of Rights of Inheritance, ought to be the Rule.

Tho'

Thomas of Galloway, Brother of *Allan Lord of Galloway*, was Earl of *Athole*, in Right of *Isabel* his Wife, the Heir of the ancient Earls of *Athole* *; and they were succeeded in that Dignity by *Patrick* their Son, who died anno 1242. His
* Cart. of Dumferm. fol. 82. MS. taken from Cart. of Cowpar P. 10. in Bib. Jurid.

Mother's Sister, the Wife of *David de Hastings*, succeeded him in that Earldom ‡. Her Daughter and Heir by him, whose Name was *Ada*, married with *John de Strathbolgie*, who in Right of his Wife was Earl of *Athole* †; and this *John's* Grandson, Earl of *Athole*, was forfeited by King *David II.*

This Earldom and Dignity came to *John Stewart* Earl of *Athole*, Brother-uterine of King *James II.* and remained, with his Successors of the direct Male-line, till the Year 1594, that

John Stewart, Earl of *Athole*, died without Issue-male. He left however four Daughters, the eldest whereof, *Dorothy*, married with *William Earl of Tullibardine*; and her Son *John*, after her Decease, served himself Heir of Line to *John first Earl of Athole*, the King's Brother: And by a Charter from King *Charles I.* *, dated at *Whitehall*, 17th February 1629, his Majesty did ratify and confirm the said Service, and the Title of Honour and Dignity of Earl of *Athole*, carried thereby in Terms so express, as seem rather to import a Judgment flowing from the Crown on the Question presently in dispute, than a mere Ratification; tho' even that would be sufficient to shew the Descent was agreeable to the Laws of the Land.

There is yet another to this purpose, in the Family of *Sutherland*, thus: *John Earl of Sutherland* having died in the Year 1512 without Issue, *Elisabeth* his Sister was served Heir to him in the Earldom of *Sutherland*, &c. and thenceforth she used the Dignity of *Sutherland*: And *Adam Gordon of Aboyn*, Son of *George second Earl of Huntly*, her Husband, assumed also the Title of *Earl of Sutherland*, *ratione curialitatis*: From whom is linealy descended *John* the present Earl of *Sutherland*. And tho' to this Instance it has been objected by the Pursuer, " That in the Proces of Declarator

" of Precedency, at the Instance of the said Earl of Sutherland, against the Earl of Crawford, the Court of Session, by their Interlocutor, found, *That the Earl of Sutherland had not instructed that the Dignity of John Earl of Sutherland, his Predecessor, was conveyed to Elisabeth his Sister, who was served Heir to him in the Year 1514;* yet notwithstanding, the Instance still stands good: For it cannot be made appear by the Pursuer, that ever the said Elisabeth was of new created Countess of Sutherland, or that the said Adam her Husband was created Earl thereof. And it is very observable in this Case, that there was but one third Part of the Judges who gave their Opinion in the Terms of the above Interlocutor, as some of the Lords will remember: And the Earl of Sutherland having by Bill reclaimed against the same, this Interlocutor of the Court was thereupon stopt;

* Vide Proces E. and no further Procedure has been in the Proces to this Day*.
 Sutherland contra E. Crawford, in the Clerks office. From whence 'tis clear, that this pretended Decision, so much laid hold on by the Pursuer, can be of no advantage to him.

In the former Instance of the Family of *Buchan*, there is a Decision of the supreme Court of Justice, and in the Case of *Athole* a Judgment of the King, the Fountain of Honour, and both, as the Defender conceives, in Point: But because there was some Insinuations made at the Pleading, that there might be still another Distinction betwixt the *Dignity of Earl* and that of *Lord Baron*, it will be here proper to observe, That among the *English*, (whose Footsteps with respect to Parliaments, and Dignities in Parliament, we in all probability followed) there was no Distinctions among *Barons* before the Time of King *John*; all of them had equal Privilege of appearing in Parliament: And tho' about the time of the *Magna charta* a Distinction was introduced, and those of ancient Descent, and otherwise of Note for their large Possessions, were stiled *Barones majores*, and summoned to Parliament by a particular Writ, as the other Barons were by a general Precept directed to the Sheriff of the County; yet all still came to Parliament

liament, till the Separation of the two Houses, that Knights of the Shire were elected, who met with the Burghesses, and chused their own Speaker.

But even thereafter the *Barones majores*, or Lords of the Upper House, had place there as Barons, tho' dignified under the Titles of *Vicount*, *Earl*, *Marquis* and *Duke*. And so it is even down to this Day, after Creations by Patents have obtained; a Peer of the greatest Dignity whatever, being still created *Baron* of some Barony, in Virtue whereof it is, that the Spiritual Lords have likewise place in that august Assembly.

In *Scotland* the Parliament was called, *The King's Baron-court*; and as far back as the Year 1171, Barons are mentioned in *Scotland*, in a Charter of *William King of Scots*, recited at length by *Selden, Chap. 7.** And in the Preamble of King *Robert I's Laws*, Barons are mentioned as present in Parliament without any Distinction of greater or lesser Barons; and indeed all the Barons were obliged to compear, and give Suit and Presence, as in the King's Baron-court, under a certain Unlaw or Penalty; but by the Subdivision and splitting of the Baronies, held at first by the great Men of the Realm, there came to be several other Heretors of Lands holding *in capite* of the Crown, who not being intitled to a Barony were called *Freeholders*, and as such were likewise obliged to give Suit and Presence in the King's Baron Court, and were Part of the Representation of the Nation in Parliament; which occasioning a great Increase in the Number of Representatives, and likewise an Expense these *Freeholders* and *Lesser Barons* could not well bear, King *James I.* who had been detained eighteen Years in *England*, and thereby acquainted with the Constitution of Parliaments there, that he might make way for two Houses of Parliament in *Scotland* as in *England*, by the 52. Act of his 3d Parliament, statute, *That all Prelates, Earls, Barons, and Freeholders, sen-*

* Part 2. Tit. of Honour.

ment,

ment, frae then furth be halden to compear in proper Person, and not be a Procurator.

This Hardship put upon the Lesser Barons and Freeholders, was the Reason in all Probability, why the great Alteration intended by the King in the Constitution went down the more easily; so that in his seventh Parliament there is an Act intituled, *That small Barons and Freeholders need not come to the Parliament:* And by the Act itself, the Project of sending Commissioners from the Shires for the lesser Barons and Freeholders is established, who were to chuse a common Speaker, to propone all and sundry Needs and Causes pertaining to the Commons; but by a Clause it is provided, *That all Bishops, Abbots, Priors, Dukes, Earls, Lords of Parliament, and Banrents, the King wills be received and summoned to his Council and Parliament, by his special Precept.*

It is true, thro' this Prince's untimous Death, this Project of two Houses does not appear to have taken Place: For by the first Act of James II's Parliament, held 26th of August 1442, *all Prelatis, Baronis, Freehalderis, and all others within Burgh and outwith, that aw Presence in Parliament, are to be summoned to appear as formerly;* but by the Act 75. Parliament 14. of the same King, it is statute, *That no Freehalder that holds of the King under twenty Pounds, be constrained to come to Parliament as for Presence, but gif he be ane Barron, or else be specially by the Kingis Command warned outhir be Officer or by Writ;* and by the 78th Act Parliament 6th James IV. it was statute, *That no Baron, Freehalder nor Vassal, that were within 100 Merks of the then Extent, should be compelled to come personally to Parliament, except the King wrote specially for them, and all that are above the Extent of 100 Merks to come to Parliameut under the Penalty of the old Unlaw.*

The rest of the small Barons and Freeholders were represented by their Procurators; whether these were Commissioners

oners chosen, as the Act seems to intimate, or by the great Barons of the same Shire, who were bound to compear, and with whom the Letters of Procuratory or Mandate were sent, does not appear.

The Alterations which afterwards happened, down to the Time of the Union, afford no Light in the present Question, and therefore are not here noticed: But from what has been said, these things appear, *First*, That in point of Descent, there could be no Distinction betwixt the *Dignity of Earl* and *Lord Baron*; the Foundation of their Place in Parliament was the same; all of them held that as *Barons*. *2dly*, When the Distinction betwixt the Greater and Smaller or Lesser Barons was introduced, there was no Notice taken either by Act of Parliament, or by the History of the Times, or by the Opinion of any Lawyer, that this created any Distinction in the Descent of Inheritance, either with respect to their Lands or their Dignities: And therefore, *3rdly*, It must be presumed, that the common Law continued the Rule in both, that is, that such Rights of Inheritance, as before the Distinction betwixt Greater and Lesser Barons, was introduced, were common to both, and descendible to Heirs of Line, or Heirs General at Law, continued the same after, and was no other than that which at this Day obtains among the Lesser Barons or Freeholders, which on all Hands is admitted to be to the *Heirs-general*, where there is no Limitation to *Heirs-male*, or Right of Entail, to break in upon the common Law.

But least here it should be objected, that Authorities are wanting as to the Descent of Lord Barons upon Females, the Defender begs Leave to subjoin two or three Instances, where the Female Descent has obtained, referring for the rest to the printed List and Condescendance, lying in Process.

Michael Lord Carlile, had by *Janet* his Wife, Daughter of *Charters of Ampsfield*, three Sons, *William*, *Michael* and *Patrick*; *William* the eldest, married with *Jean* Daughter of *Johnston*, the Predecessor of the Marquis of *Annandale*,

but this *William* dying in the Beginning of the Year 1573, *vita patris*, left by his Wife Issue, *Elisabeth* his only Child. *Michael* the second Son taking Occasion of the Distress of the Representative of the Family, framed a supposititious Charter, which he made bear Date the 24th of March 1573, some Weeks after his eldest Brother's Decease, as if the same had been granted by *Michael* the Father, during whose Lifetime it never appeared, but after his Death came to be confirmed under the Great Seal, in the 1580. *Michael* the second Son, did not long survive his elder Brother *William* and his Father; and *Elisabeth*, the Daughter and Heir of the said *William*, with Concourse of her Mother, having raised a Process against *John* the Son of *Michael*, the second Son of the Lord *Carlile*, upon the Articles of Marriage bewixt *William* and his Wife, and upon an Inhibition which the Wife had raised concluding the said Daughter and Heir had the only Right to the Estate, (at a Time when as yet the Fraud in supposing of the Charter was not discovered) the Lords found, " That the O-
 " bligement in the Contract of Marriage, did not bar the A-
 " lienation by *Michael* Lord *Carlile* the Father, to *Michael*
 " his second Son; and that the Inhibition in Name of the
 " Mother Wife of *William* the eldest Son, was of no Avail,
 " she having no Interest in the Property of the Estate; and
 " therefore affoilzied *John*, the Heir of *Michael* the second
 " Son from the Process;" Which Decree is of Date the 28th
 of December 1593. After this Decree was obtained, *John*
 the Son of *Michael*, pursued *Elisabeth*, as Heir to *Michael*
 Lord *Carlile* her Grandfather, for Warrandice of the foresaid
 Charter: But by this Time, the Falshood of the Charter was
 discovered; and she offering to improve the same; as suppo-
 sititious and forged, at the Hearing of the Cause on the 6th
 of March 1594, " The Lords of Council and Session, having
 " considered the Depositions of the Writer of the Charter
 " 1573, and of the Instrumentary Witnesses adhibit to the
 " same, they declare the Charter to be false, forged and feign-
 ed,

" ed, and that it should make no Faith in Judgment nor
" outwith." All which appears by the Records of Acts and
Decrees yet extant, in the Book beginning the 7th of De-
cember 1593, and ending the 4th of July 1594.

It is no Wonder therefore, that while *Elisabeth*, the Heir of
the Lord *Carlile* by his eldest Son was outed of her Estate, by
the Means of this forged Charter, she did not take upon her
the Title and Dignity, having nothing wherewith to support
it ; but so soon as she had recovered her Right, it appears she
was married with Sir *James Douglas*, Nephew of the Earl of
Morton Regent, and upon the 4th of *April* 1594, in a Char-
ter granted by her, with Consent of her said Husband, she is
designed *Elisabeth Domina Carlile*, and subscribes *Elisabeth*
Lady Carlile, while at the same time her Husband signs *James*
Douglas; and in the Decreet of Ranking of the Nobility as to
their Precedency in the Year 1606, she and her Husband, in
Right of the Courtesy, are ranked in the due Place of her
Predecessors the Lords *Carlile*: And after this Decreet, we find
the Lady, in a Charter of the Lands of *Thornock*, granted to
Johnston Commendator of *Halywood*, 6th *September* 1606,
designed *Elisabeth Lady Carlile* and *Torthorald*, and subscrib-
ing in Manner as above, viz. *Elisabeth Lady Carlile*.

The Lordship of *Carlile*, which held Ward, came after-
wards to recognosce in the King's Hands, thro' the Alienation
of more than the Half; and *William Cunningham* having
obtained a Gift of Recognition, resigned the same in the
King's Hands for new Infeftment, to *James* now Lord *Tor-*
thorald, and his Heirs male, which Charter contains an Erec-
tion in a free Lordship and Barony, to be called the Lordship
and Barony of *Torthorald*, *reservato tamen libero tenemento*
seu vitali reditu omnium terrarum predict. *Dominæ Elisabethæ*
Carlile, Dominæ de eodem, dated 6th of *April* 1609.

The Defender has dwelt the longer upon this Instance, be-
cause the Pursuer cannot get free of it, by his usual Pretence,
That an Heir-male was not extant: For here your Lordships
perceive

an Heir-male was existing, and an Heir-male who maintained with great Vigour, a Plea for the Estate upon a forged Charter, yet never had the Assurance to claim the Honours; and therefore the Pursuer endeavoured to get the better of it another Way, by alledging *first*, That the Son of this Marriage, immediately after his Father's Decease, took upon him the Title of Lord *Torthorald*, and not of *Carlile*. *2dly*, That the Lady afterwards married with *Sinclair of Blainsmuir*, who never assumed the Title in virtue of the *Courtesy*.

But how could he, when by the former Objection it appears the Lady had a Son of her first Marriage? And how could that Son take any other Title but that of his Father's, while his Mother, who was possest of the Dignity of *Carlile* was alive? And it is a Doubt if he could assume it after her Death, considering that the Lordship of *Carlile* had recognosced in the King's Hands, and was given out thereafter under the Designation of the Lordship of *Torthorald*, into which Dignity the Honours of *Carlile* seemed to be sunk, only with Reservation of the Frank Tenement to the Lady during her Life, whereby she lost nothing of her Title and Dignity, tho' thereafter it might be disputed if it was descendable.

The precise Time when the Family of *Harris* was raised to the Dignity of Lord Baron does not appear; but 'tis plain from the Records, that in the Parliament holden in the Year 1478, the Lord *Harris* was a Lord of Parliament, without any Creation or Instalment in that Parliament, and so behoved to be Lord of Parliament before that Time. *William Lord Harris*, died without Male-issue, about the Year 1540, leaving three Daughters, *Agnes*, *Katharine*, and *Janet*; the Eldest, *Agnes*, married with Sir *John Maxwell*, second Son of *Robert Lord Maxwell*, whereupon he was called to Parliament, and sat as Lord *Harris*, the 16th of April 1567; at this time there was a collateral Heir-male of the Family existing, who in a Charter granted by him to the Lord *Harris*'s Daughter and her Husband designs himself, *Archibaldus Harris de Madinpaup, ac hæres*

haeres masculus quondam Gulielmi domini Harris de Tereges.

There is no answering this Instance in a plain and direct Way, and therefore the Pursuer is obliged (without any Ground) to presume, that this *Archibald Harris* might have been an Heir-male of the Family, before they were assumed into the Rank of Parliamentary Lords: But this can never pass, tho' we should suppose the Family of *Harris* to have had their Dignity no sooner than the Lord *Harris* appears in Parliament, that is in March 1478, because if this *Archibald* was not descended of this Lord *Harris*, but of his Father or Grandfather, he behoved to be much above 100 Years old, at the Time of the Charter, which neither Law nor Reason will allow to be presumed.

Another Instance of many we might here give, and for which we refer to our Condescendance, is of the Lords *Abernethy* of *Salton*; for upon the Failzurē of the direct Male-line of that Family, in the Person of *Alexander Lord Abernethy of Salton*, who died issueless, Anno 1669, *Alexander Abernethy of Auchinloich*, was his next Heir-male, yet his Cousin *Alexander Fraser of Philorth*, Son and Heir of *Alexander Fraser of Philorth*, and of *Margaret Abernethy*, Daughter to *George Lord Abernethy of Salton*, being served Heir of Line to the said *George* his Grand-father, on the 14th of April 1670, did thereupon take upon him the Title of *Lord Salton*; and his Majesty King *Charles II.* by his Letters Patent, dated at *Whitehall* 11th of July that Year, ratified and approved his said Service, and his using and taking upon him, as Heir of Line, and next of Blood, and lineally descended of the said Family of *Salton*, the Title, Dignity, and Rank thereof; and declared, That the said *Alexander*, and the Heirs lineally descending of him, might use and enjoy the foresaid Title and Dignity in all Time coming, as any other Lord *Abernethy of Salton* did in any Time bygone use and enjoy the samen, and all the Honours and Privileges thereto apertaining, &c. Which Letters Patent were ratified in the Parliament the 22d of July the Year foresaid.

From this 'tis clear, That the King who is the Sovereign and Fountain of Honour, and whose Judgment in Cases of this Nature ought to be of the greatest Weight, knew of no Distinction betwixt the Succession to Dignities and other heritable Rights.

And thus from our Historians, Records and Antiquarians, the Defender hopes he has made out, in exact Conformity to the common Law of the Land, and the Opinion of our Lawyers, that the Noble Dignities of *Scotland*, as all other Rights of Inheritance, are descendable to the *Heirs-female*, general *Heirs at Law*, and that too, in Exclusion of remoter *Heirs-male*; and further, that there is no Distinction as to the Point of Descent, betwixt the Dignity of *Lords Barons*, and that of *Earls, Marquisses, &c.* so that it is now Time to look for what Light we can have in the present Question, from the Decisions of this supreme Court.

And indeed when we consider the perfect Harmony there is betwixt the common Law, and the Opinion of our Lawyers, and the History and Records, it may appear more surprising, that we should have any one Instance upon this Question, than that we should have none at all; yet the Defender hopes he is able to bring more than one; and tho' he admits there is but one Judgment betwixt the Heir of Line, and the collateral Heir-male competing, which is in the Case of the Dignity of *Oliphant*, yet the others (some whereof he has already noticed) he conceives are of equal Weight; if from thence it shall appear the Court has been of Opinion, that such Dignities are descendable to the Heir of Line, or Heir General at Law, being Female; because the Pursuer's Argument goes so far, or it is not of any Weight that the *Heir-female* cannot at all succeed in such Dignities.

The Case of the Earl of *Strathern* has been already referred to, where the King as Heir-male was Competitor with the Earl, pretending to be descended of *Eupham Countess of Strathern*, Heir of Line, as only Daughter to *David Earl of Strathern* her Father.

It is true the Issue in that Process was not joined upon the Point now in Dispute; *whether an Heir-female could succeed in such a Dignity*: The King's Lawyers having insisted that there was not a strict legal Evidence of the Earl's Descent from *Eupham* the Countess, notwithstanding several Retours of Inquests, finding the Earl descended. But what Occasion had there been for all this Struggle? and to impeach the only known Method by the Law of the Land, of establishing the Propinquity of Blood to nearer or remoter Predecessors, if this single Objection had been good? *That Dignities and Honours were not descendable to Heirs-female*: Here was an End of the Cause at once, if either the Judges, or the Council for the King (who himself was in *Scotland* the Time of the Trial) had thought, that such an Objection was agreeable to the Laws of the Land: And the Defender must appeal to common Sense and Reason, if his Argument is not concluding, that seeing no such Objection was made against the Succession of *Eupham*, as an Heir-female, it must have been the Opinion of all the Judges, and of all the Lawyers in the Kingdom at the Time, that by the Law of *Scotland* Heirs-female might succeed in Dignities, as well as any other Right of Inheritance.

The Decree of Session in the Earl of *Buchan's* Case, is another Instance of this Kind; where altho' indeed *James Stewart*, Grandson and Heir-male of *John Earl of Buchan*, appeared not at that Time; nor did he ever lay any Claim to the Dignity of *Buchan*; yet there were several noble Earls, whose Interest it was to have objected to the Title of the Countess, and who doubtless would not have failed in a Dispute of this Kind (which usually is managed with the greatest Warmth) to have alledged, that their Party, as an *Heir-female*, could inherit no Dignity, and consequently could not dispute the Precedency with them: And if this Objection was moved and over-ruled, here is a Decision upon the Point; but if it was not moved in, the Silence of the Competitors affords yet a stronger Argument, that the general Opinion of the Nation was against any such Objection; at least it seems so was the Opinion of the Judges, whose Part it was to have noticed the

Failure in the Pursuer's Title; and which doubtless they would have done, if it had been agreeable to Law, that the *Heir-female* could not take such a Dignity.

The last Instance on this Head, shall be that of the Dignity of *Oliphant*, the Case whereof is observed by the learned Lord *Dury* in his Decisions, 11th of July 1733; whereby it appears, that the only Daughter, and Heir of Line of the Lord *Oliphant*, was insisting to have it found and declared, that she, as *Heir of Line*, had Right to the Dignity and Title of the Lord *Oliphant*, against *Patrick*, the *Heir-male*, who, as such, and in Virtue of a Right he had got from the Pursuer's Father, pretended Right to the said Title and Dignity; and no Writs appearing from whence it could be discovered, how this Dignity was limited, the Title being in the Family before any Patents were in Use; and there being no Pretence that the Estate was erected into a *Lordship*: So that in every View, with respect to the Point of Succession, the Case was the same with this betwixt the Pursuer and Defender: The Lords found, That the Lords of *Oliphant* being in use to sit in Parliament, and to be designed in Writing from the King, his Cousin, with the Title of Lord *Oliphant*, was sufficient, conform to the Laws of this Realm, to transmit such Titles in the Heirs-female, where the last deceased had no Male-children, and where there was no Writing extant, to exclude the Female.

The King himself, the Fountain of Honour, was present in Court, when this Judgment was pronounced; so that it may well be presumed, considering the Nature of the Question, his Majesty's Opinion was in nothing different from that of his Judges; and the Defender might plead it as a Regulation for the Future, in every Case touching the Descent of Honours and Dignities: But to be sure, where the Cases are so much alike the one to the other, and where no Alteration in our Law has happened since that Time, it is at least a very notable and weighty *Precedent*; and the Pursuer it seems finds it such, when he struggles so much to evite the Force of it, that rather than want an Argument to defeat it, he brings such as appears visibly rather to support the Judgment.

He tells us, *That the Lord Oliphant, Father of the Heir-female, had resigned the Estate and Dignity into the King's Hands ; that the King, notwithstanding the Decision, created the Heir-male Lord Oliphant ; and tho' the Heir-female and her Husband had the Titles of Lord and Lady Mordington given them, with the Rank and Precedency of the ancient Lord Oliphant ; yet still this Circumstance of the Case, that the Honours were remaining with the King, upon the Resignation of the Predecessor of the Heir-female, shows (says he) that there was no Place for deciding the Question upon the Claim of the Heir-female.* And the Pursuer further adds, *That the Title of Oliphant did not remain with the Heir-female, but was conferred upon the Heir-male.*

These are the Arguments insisted on by the Pursuer ; but of what Avail can they be, when the Words of the Judgment are duly weighed ? If the Heir-female had no Claim at all, by reason of the Father's Resignation, why was the Process allowed to go on ? Why did the Judges proceed to determine a Point of no Consequence to the Parties in Court ? But tho' the Judgment could have no Consequence as to the Parties, yet still it is a Resolution of all the Judges, the King present, and upon such a Case, as his Majesty might well have demanded the Opinion of his Judges, in Point of Law, and which they have given in very express Terms, and to which it appears his Majesty did conform his Procedure : For tho' the Title of Lord *Oliphant* was given to the Heir-male, who was of that Name, (as the Pursuer observes) yet the Rank and Precedency of the Dignity of *Oliphant* was given to the Heir-female, who, when she had passed into a Family of another Name, had no Occasion to retain the Name of *Oliphant*. And so we see in the Rolls of Parliament, the Lord *Mordington* is ranked in the Place of the ancient Lord *Oliphant*, before many Peers created in the Reign of *Charles I.* yea in the Reign of *James VI.* and even of *James III.* whereas the Lord *Oliphant*, after this new Patent, was ranked much lower.

King *Charles I.* in this Procedure, followed the Example of

** Dugdale's Baronage of England, v.
3. p. 23, and 245.* Edward IV, King of England, his Predecessor, with respect to the Honours of the Lord Dacres*: The Case whereof was, Thomas Lord Dacres had Issue, Thomas his eldest Son, Ralph the second, and Humphry his third: Thomas the eldest, died *vita patris*, having Issue, Joan his Daughter and Heir, married with Sir Richard Fines Knight. After the Death of the Grandfather, Henry VI. by Letters Patent, of Date 7th November anno 7mo, reciting the Pedigree and Marriage, Accepts, declares and reputes the said Richard Fines to be Lord Dacres, and one of the Barons of his Realm. But afterwards Humphry Dacres made Challenge to the Estate, as well as the Dignity; and both Parties having submitted themselves to the Arbitrement of King Edward IV. the King, the 8th of April, anno regni 13. did award in these Terms, That the said Richard Fines, in the Right of Joan his Wife, and the Heirs of his Body lawfully begotten, should be reputed, had, named and called Lord Dacres; and that the said Richard Fines, and the Heirs of his Body by the said Joan his Wife begotten, should keep, have and use the same State and Place in every Parliament, as the said Thomas Dacres Knight, the deceast Lord Dacres had used and kept; and that they should have and hold to them and their Heirs the Mannor of Holbech, which pertained to the said Lord Dacres. And that the Heir-male might not go away altogether discontented from the Royal Presence, the King on the other Part did furthermore award, That the Heir-male should have another Part of the Estate, and that he should be reputed and called Lord Dacres of Gillisland, and have and keep the Rank and Place in Parliament next adjoining beneath the Place of the said Richard Fines Lord Dacres, had and occupied, or that the Heirs of the Body of the said Joan his Wife should have and occupy. And Coke on his Commentary on Littleton †, refers to a late Case of the same Family of Dacres, where it was adjudged by all the Judges of England, that Sampson Leonard, who married with Margaret, the only Sister and Heir of Gregory Fines, Lord Dacres, had this Dignity in the Right of his Wife.

[†] Coke, Part 1st.
Inst. fol. 165, quoted above.

Thus

Thus we are insensibly led to take a View of the Law of *England* with regard to the Female Succession in Dignities, and which, in as far as we can have Information from their Law-books, is much to the same Purpose with our own. *Coke* in the Place before referred to, after indeed that he has stated a Singularity of the Law of *England*, “ That where there are several Daughters, the King may, by reason (as he terms it) of the *Uncertainty*, chuse which of the Daughters he will to succeed in the Dignity, tho’ all are Coparcenaries in the Estate: *Adds*, But if an Earl or Baron, who hath his Dignity to him and *his Heirs*, have Issue one Daughter, the Dignity shall descend to the Daughter, for there is no Uncertainty, but only one Daughter; so the Dignity shall descend unto her and her Posterity, *as well as any other Inheritance*: And this (says he) appeareth by many Precedents, and by a late Judgment given in *Sampson Leonard’s Case*, (of which mention has been already made) and in the Case of *William Lord Ross*.

The Defender, in the Course of this Process, has brought many more Examples of this Succession, which are lying in Process, and which he here omits for Brevity’s Sake to repeat: The Authority of this great Lawyer of the *English* Nation, will of itself be sufficient; and from his Words it appears, *1st*, That Dignities are descendable to Females and their Posterity. And *2dly*, That he ranks the Descent of Dignities in the same Case as any other Inheritance. ’Tis true he puts the Case, where a Dignity is limited to a Man and *his Heirs*, which the Pursuer will probably argue has no Concern with the present Case, where it does not appear that the Dignity of *Lovat* was conferred upon the first Lord *Lovat* (whoever he was) and *his Heirs*.

But to be sure the Prosecutor of this Action does not hereby mean, that the Dignity should be *caducary*, so as that if he cannot take it himself, no other should. *2dly*, It has already appeared, that by the Law of *Scotland* in many Rights of

In-

Inheritance, where Heirs are not named, the Right falls to the general Heir. And of this we have an Instance also, in the Dignity of a Lord Baron itself in the Time of King James VI. who created Sir *Michael Balfour* of *Balgarvie* a Baron Banrent and Lord of his Parliament, by the Title of *Lord Balfour of Burleigh*, by Investiture with Ceremony upon the 16th Day of July 1607, without any mention of *Heirs* in his Creation: and yet upon his Death, without Heirs-male of his Body, his Daughter and sole Heir *Anne* succeeded him in his Estate and Honour. *Vide MS. of Sir James Balfour Lyon King at Arms, de jure prælationis Nobilium Scotiæ, in Bibliotheca Juridica Edinburgensi.* But, 3dly, The learned Author before mentioned, with respect to Dignities, says, " When " a Man is called to the Upper-house of Parliament by a " Writ, he is a Baron, and hath Inheritance therein, with- " out the Word *Heirs.*" He adds indeed, " The King may " limit the general State of Inheritance created by the Law " and Custom of the Realm, to the Heirs-male or general of " his Body, by the Writ:" And gives an Instance of *Broomfleit*, who, in the 27th of Henry VI. was called to the Parliament by the Name of the *Lord Vescy*, with the Limitation in the Writ, to him and the *Heirs-male of his Body*. And if Instalments with us are of the same Nature with the Writs in *England*, we have an Instance of the same kind in the Reign of King James IV. with respect to the Earl of *Bothwell*, who upon the 13th October 1488, gets a Charter of the Lordships of *Bothwell* and *Crichton* under the Great Seal, to him, & *hæredibus suis quibuscumque*; and four Days thereafter he is introduced to Parliament: And the Parliament Rolls bear (after a long Preamble of his Services) That the King, the Three Estates being present, and by their Consent erects these two Lordships, *In unum liberum Comitatum, pro perpetuo Comitatum de Bothwell nuncupand. eundemque Dominum Patricium in Comitem creavit, & Comitis titulo decoravit, per præcinctionem gladii, ut moris est*

est; ita quod ipse & sui heredes pro perpetuo futuris temporibus Comites de Bothwell vocentur; Comitisque dignitate fulgeant. But in all the other Instalments which occur in this and the after Parliaments, there is nothing further noted, but the Day of the Month, *quo die Rex fecit, creavit, & nominavit N. Dominum Parliamenti;* and it is observable, that as in the Case of the Lord *Bothwell*, so likewise in the most of all other Cases, of such as are named in Parliament, they had previous Grants of their Lands and Dignity, under the Great Seal, before they are introduced to Parliament, to them and *their Heirs* in general; so that the Nomination was but a mere Form. And further, that most of our Lords were not named at all in Parliament; for from the Time of King *James I.* to *Queen Mary*, there are only two Dukes of six (created during that Time) that are installed in Parliament; and of twenty four Earls, only one; and of thirty six Lords, there appear only nine to be installed in Parliament, and these by short Notes, as is above mentioned, rather for ascertaining their Ranks and Precedency according to the Dates of their Instalments, than for limiting the Descent of their Dignity; which being a *Right of Inheritance*, was left to be governed by the Law of the Land, or by the Limitation of Descent in their Charters, where their Lands were erected into a free *Earldom* or *Lordship*, which from what has been hitherto observed, carried alongst with them the Dignity to whatever Heirs the Earldom or Lordship was limited; but where no such Erection did appear, and that the Tenure was not in free *Earldom* or *Lordship*, the Descent of the Dignity as a Right of Inheritance, could be no otherwise limited, but by the general Law of Succession in the Kingdom, which from the Law itself, from the Authority of our Lawyers, from our Records, Historians and Antiquaries, from the Decision of the Supreme Court, and the Judgment of the Prince, and from the same Rules obtaining in our neighbouring Nations,

appears to have been in the Inheritance of Dignities, as well as of other Subjects, to the *Heirs-general at Law and of Line*, where no other Limitation appeared.

It may be thought unnecessary, after what has been said, to insist upon the Laws and Usage of other Nations; we shall only observe, that by the Laws of *Normandy*, from whence some of our Authors pretend our Feudal Customs are transmitted, the Female Succession in noble Feus is established. The 199th Article of that Law is in these Terms, *Homme espousant femme, a qui appartiente sif noble, est tenu faire foi & hommage au Seigneur; & ne doit paier aucun relief, pour veu que la femme l'ait une fois paie.* And *Argentræus*, both in his History and Commentary on the Customs of *Bretagne*, gives us almost in every Page Instances of the Successions of Women to Dignities and Feus; and in his Commentary upon the *Affia*, or Laws of Godfrey Duke of *Britanny*, who being a Son of *England*, came to that Dignity by marrying the Heiress, tells us, That the Dutchy was descendable to the Heir-female, and yet it was a *noble Feu* of the Crown of *France*: And one of the old [*Paries Selden's Titles of Honour, Part II.*] holding of that Crown, as the Dutchy of *Burgundy* was another, which every Body knows was by *Mary of Burgundy* transferred to the Emperor *Charles V.'s* Brother, by his Marriage with the Heiress. *Perezius* too observes, in his Commentary upon *tit. Cod. de dignitatibus*, Numb. 49. *Moribus quarundam gentium, non plane obscuratur nobilitas mulierum illustrium, nuptias contrahendo cum abjectæ conditionis viris, quod & olim quidem tributum jure certis familiis, nunc passim productum ad illustres Dominas, quæ Comitissæ sunt aut Ducissæ, ut maritos nobilitent, & Comitatus aut Ducatus dignitatem in eos transferant.* And Numb. 51. treating more particularly of the Female Succession in Feus, he says, *Inde observa fæminas capaces esse successionis, nisi nominatim cautum sit, ut soli masculi succedant, nec tantum in minoribus feudis,*

sed

sed & in principalibus ditionibus & etiam regnis, sic in Hispaniæ, Angliæ, Siciliæ, Sueciæ, Neapolis, Bohemiæ, Hungariæ, Cypri & Lusitaniæ regnis: And the only Exception we have in Europe is the Crown of France, to which Females succeed not, under Pretence of the *Salique Law*; about the Existence and Import of which, their own Authors are not agreed, and was never heard of to be the Rule of Succession in France, till the Reign of *Philip de Valois*, against whose Succession the Duke of Burgundy, and several other great Peers of the Realm protested, as did likewise *Edward III.* of England, Heir of Line; from whence it is, and from an after disputed Succession upon the same Head, that the King of England retains the Title of *King of France* to this Day. But even this Exception, as the French will have it, with respect to the Crown of France, shews, *That as to the other great Dignities of the Realm, they are governed by the general Rules of Succession, which are for the most part the same all the World over.*

But the Pursuer has alledged, “ That the governing Rule in this Question ought to be the old *Feudal Law*, in which the Male-succession only obtained; for that such Feus, whether greater or lesser, were originally given for military Services, of which Women were not capable.”

It is very difficult to fix the Feudal Law as to this Point: We first indeed hear of it in *Lombardy*, but then almost every City was governed by a different Feudal Law.. In *Cremona*, *Pavia* and *Milan* the Customs were quite opposite to these in *Mantua* and *Verona*, and so forth, which gave occasion to such different Opinions betwixt the two great Compilers of that Law, *Gerardus Niger* and *Obertus de Orto*: And these Customs had scarce well been settled, when the *Normans* made great Alterations in them; and so even in *Italy* they were model'd from time to time, without any regular Authority, till the Reign of *Frederick II.* which was long after the Time of *Malcolm Canmore King of Scotland*; and it has already appeared,

peared, that in his Time and before, the Female-succession had obtained with us. Neither does it appear that the Feudal Constitutions were ever approved of, or received with us. The *Scots*, as well as the *English* and *French*, have adapted some of the Feudal Customs to their own ; but from this it can never be inferred, that as to the Point of Succession we are to be governed by that Law.

2do, The Feudal Law, debarring the Women from Succession, had so many Exceptions, that it only retained the Name of a *Rule*: These are to be met with in the Feudal Authors; and particularly *Struvius*, in his *Syntagma Juris Feudalis*, Cap. 9. Numb. 8. amongst the Exceptions from the Rule, reckons in general, that *Feuda franca* did admit of the Succession of Women, as also where the Superior did accept of a Duty in place of Service; and so it is, that either our Feus were held Blench, or Feu for Payment of Money, or some other fungible, which were *Feudum francum*, or *Ward*, wherein the Superior had a Duty for Service in the Minority, and for the Marriage ; and anciently the Heirs could not marry without the Superior's Consent, which was in place of military Service, and therefore by these Rules, even according to the common Feudal Law, Women ought to succeed in Feus as they are constituted in this Kingdom. But what occasion is there for treating, whether Women ought to succeed in Feus and Dignities, or not ? when it is already made out from our antient Law-books, that they actually did succeed even in military Feus; and that, as appears from *Skene de verb. signif. tit. HOMAGE*, and elsewhere in the *Regiam Majestatem*, Women performed Fidelity only, and that their Husbands did Homage for their Feus.

3to, If the antient Feudal Law was the governing Rule of Succession with us, why do not all the Males of the same Degree succeed in Military Feus? for it appears by the Law-books that this was the Rule of Succession by the antient Feudal Law, which however no Man will say ever obtained with

us. The Right of *Primogeniture* among Males was not introduced into *Italy* till the *Normans* came into that Country, and yet to be sure we had the Right of *Primogeniture* long before; and why not also the Female Succession even in Dignities?

But it was further objected, " That the Dignity of Baron
 " was conferred for this very Intent, that the Person to whom
 " the Honour was given should assist in Parliament, and Coun-
 " cil, which Women were never admitted to do: *Corporalia*
 " *munera fœminis ipse sexus denegat, quo minus honores aut mu-*
 " *nera injunguntur**."

This, with Submission, is one of these Arguments, which, by endeavouring to prove too much, proves nothing at all. A personal Incapacity, whether arising from Age, the Sex, or from a Defect in the Body or Mind, may bar the Exercise for a Time, but cannot hinder the Descent of the Honours and Dignity: A Minor, Ideot, or frantic Person, tho' a Male, can no more assist in Council and Advice in Parliament, than one who is deaf or dumb; yet no body has ever maintained, That Titles of Honour and Dignity, which are of Inheritance, were not descendable to such Persons, but behoved to pass to the next collateral Heir. And why ought not the same to obtain in the Female Succession? and still with greater Reason, in so much that the Lady may have a Husband who can perform the Duties inherent in the Dignity, and who, as we have seen by the Instances already mentioned, was generally admitted, *ratione curialitatis*, in the actual Performance of it. But such Honours are always given by the Prince to the dignified Person, not only as a due Recompence for himself, in respect of his past Services, but also as a memorable Reward thereof in his Posterity: And if the Infamy of the Ancestor be a Blot to his Posterity, and the Blood of the Posterity be corrupted upon the Offence of the Predecessor; it is still with more Reason, that the Honour due to the Ancestor should likewise remain an Honour to the Posterity, of whatever Sex, especially

* L. 3. Par. 3. ff.
 de munere. & honor.

in the Case of Dignities, which, unless the Grant be so limited, are not purely personal, but patrimonial ; and so are descendable, as has been frequently before observed, like other Rights of Inheritance.

The Pursuer has likewise brought some Instances, where collateral Heirs-male have succeeded in Dignities, in Prejudice of the Heirs-female then alive. But it has been shewn in every Instance, save one, that this Descent was by reason that the Estates were erected into *Earldoms* and *Lordships*, and that these were descendable to the Heirs-male, and of consequence carried the Dignity along; and where this does not appear, for want of the Writs of the Family pointed at, the Presumption must be, That so was the ancient Descent of that Earldom or Lordship, or that the Heir-female took it to be so. But in the present Case, the Estate of *Lovat*, tho' indeed very great, was never erected into any Lordship; and for many Years, above a Hundred after the Family was assumed into the

* Vid. the Defendant's printed Condescension of the Titles to the Estate. Rank of Nobles, the Estate, as has been noticed * from the Titles to it on Record, was always provided to the general

Heirs at Law, and so was descendable to the Female-heirs : Which is a further Argument, that this Dignity of *Lovat* from the Beginning was understood to be descendable upon the right Heirs at Law ; otherwise it cannot be imagined that the Estate would have stood so long devised after this Manner, to give Occasion to the rending it from the Honours, which, upon the Existence of an Heir-female, behoved to have happened, if the Honour and Dignity was only descendable to the Heir-male.

It was further urged, “ That ever since Patents of Honour came in use, they have been expressly limited to Heirs-male ; which presumes retro the Intendment of the Crown, that at whatever Time, or in whatever Manner Honours were created, these should descend to the Heirs-male, there being no Reason assignable why any Alteration should be introduced when Patents took place.”

But,

But, in the first Place, This is arguing against Facts, and the numerous Instances that have been brought by the Defender in the contrary*. 2dly, The Argument seems to conclude the other Way, That seeing an express Limitation has been introduced so soon as Patents appeared, which with us is no earlier than the Reign of King *James VI.* where no such Limitation does appear, the common Law of the Land is the Rule; And as there are Instances, even since that Time, of Patents to Heirs whatsoever, which no body can dispute would descend to Heirs-female; the Presumption from the general Course of the Law, where no Limitation whatever appears, brings the Case to be the same as if Heirs-general were expressed. 3rdly, The Reason for the Limitation in later Patents is obvious to the most common Capacity, the Continuance of the great Number of Peers by the Succession of Heirs-female, which behoved still to be more increased by new Creations, if under no Limitation, especially *when in certain Emergencies, we have in our own Times seen a great Number created in one Day.* So that if this Argument of the Pursuer is duly considered, it is so far from bringing him any Assistance, that it notably supports that which the Defender, in the Course of his Pleading, has been endeavouring to maintain. And in *England* likewise, since Patents came in use with them, these Patents have been almost uniformly conceived in favours of Heirs-male: Notwithstanding whereof, when any Disputes happen concerning the Succession to Dignities constitute without Patents, such Cases with them are always judged according to the common Rules of Succession, to the Heirs-general at Law, without any regard to Patents being almost constantly devised, since they came in use, to Heirs-male.

The Objection brought from the Humour and *Conceit* of *Highland Clans*, of which the Name of *Frazer* is said to be one, “ That they are always fond of being led and governed by a

“ CHIEF,

* Vid. the Defender's Condescendence of Instances.

" CHIEF, who is capable of bearing of Arms," is of as little Weight as the former.

For it is not the Opinion of those People that will make an Alteration in the Law, which is a common Rule to the whole Nation : *Lex est communis sponsio*, says the Law ; and we know of no particular Statute introducing a Diversity of Succession in the *Highlands* from the other Parts of the Country. But besides, among the most ancient Writs of this Family, the Indenture of Marriage betwixt the Lord *Fenton* for his Sister, and *Hugh Lord Lovat*, the Barony of *Golsford*, and other Lands in the East Country, is given for the Portion : So that at this Time 'tis presumable the Family's Possessions in the *South* were as valuable as those they had in the *Highlands*.

And thus the Objections offered for the Pursuer, in so far as they have occurred to the Defender, being removed ; the general Law of the Land, conforming to so many Instances as have been brought from our Records, and the Historians of our own, as well as of other Nations, and cleared and explained by the Judgment of the Crown and the sovereign Court, and the Opinion of our Lawyers, ought to take place.

In respect whereof, &c.

JAMES GRAHAM.

G E-

GENEALOGY of the Family of
Lovat, from *Hugh Lord Fraser of Lovat*, who died 1646.

HUGH Lord Fraser of Lovat died 1646.

Hugh Master of Lovat
died, vitâ patris, 1643.

Thomas Fraser, *designed,*
Of Beaufort.

Hugh Lord Fraser of Lovat
*succeeded his Grand-
 father, and died 1672.*

Captain Simon Fraser
*of Beaufort, Pur-
 suer.*

Hugh Lord Fraser of Lovat
died 1697.

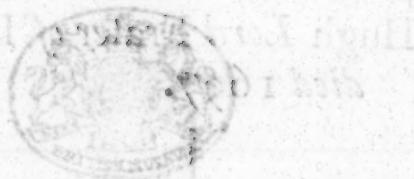
Æmilia Lady Fraser of Lovat
*succeeded her Father, and
 died 1727.*

Hugh Lord Fraser of Lovat,
Defender.

(25)

GENNAIO 1867
di Giulio Cesare Vassalli
di Montebelluna (Treviso)
per la mia famiglia.

HUGH THOMAS PORTER



1867
1867
1867

1867
1867

